

No. 22664 ✓

IN THE
United States Court of Appeals
for the Ninth Circuit

WALTER C. GATES, doing business under the firm
name of GATES CABINETS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

BRIEF FOR THE APPELLANT

FILED

MAY 31 1968

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BRIEF FOR THE APPELLANT

JURISDICTIONAL STATEMENT

This action was brought in the District Court for the Central District of California by Walter C. Gates, doing business under the firm name of Gates Cabinets, (hereinafter referred to as the taxpayer), to recover from the United States the sum of \$24,073.40, with interest as allowed by law (R. 2-11) alleged to have been erroneously and illegally collected from the taxpayer as federal excise taxes. The taxes in issue were

assessed against the taxpayer allegedly pursuant to Section 4061(a) (1) of the Internal Revenue Code of 1954, and collected from him with respect to certain articles manufactured and sold by him during the period from April 1, 1960 to June 30, 1961. During the period December 7, 1961 to January 21, 1966, taxpayer paid \$25,495.06 of which \$12,000.00 was paid within two years immediately preceding the filing of a claim for refund as provided by law (R. 67), on February 17, 1966, (R. 7-10) for refund of such taxes in the amount of the alleged erroneous payment, and the present action was brought to recover the overpayments made within the time provided in Section 6532 of the 1954 Code, on November 18, 1966 (R. 2), more than six months after the claim was filed. The District Court had jurisdiction under 28 U.S.C., Sections 1340 and 1346(a) (1) and 26 U.S.C., Section 7422 of the Internal Revenue Code of 1954.

On facts agreed to by the parties and set out in the Stipulation and Order thereon (R. 34-36), plus documentary evidence introduced by stipulation of the parties, the District Court on December 29, 1967, made findings of fact and conclusions of law (R. 48-50) which were later, upon motion filed by the United States, amended (R.67-72). The District Court entered judgment for the taxpayer (R. 52) in the sum of \$5,940.27, with interest, on December 29, 1967. On February 3, 1968, the taxpayer filed Notice of Appeal (R. 65) from the Judgment entered on December 29, 1967. Jurisdiction of the appeal is vested in this Court by 28 U.S.C., Section 1291.

STATEMENT OF THE CASE AND QUESTIONS INVOLVED

The facts are not in dispute. Taxpayer was incorrectly assessed excessively for excise taxes claimed due for the years 1960 and 1961, and pursuant to such assessment paid installments as set forth in Government's Exhibit "A" during the period December 7, 1961 to January 21, 1966, paying the Government on such wrongful assessment the total sum of \$25,495.06 (R. 67). The correct excise tax liability assessment including penalty and interest, was agreed to be the sum of \$6,371.52 (R. 70). More than \$6,371.52 of the \$25,495.06 paid, had been paid as of April 23, 1963, as shown by the list of payments made in Government's Exhibit "A," and subsequent thereto, payments of \$12,000.00 were made within two years of the filing of the claim for refund (R. 34). The question presented is whether, when more money is paid than is legally owed, the United States should apply payments received first to tax, interest and penalties legally due, (here admittedly \$6,371.52) (R. 70) and that subsequent payments in excess of the tax, interest and penalty owed, such as the \$12,000.00 paid within two years of the claim for refund herein, should be deemed overpayments recoverable herein.

SPECIFICATION OF ERRORS RELIED ON

Taxpayer contends the District Court herein erred in concluding as a matter of law that the Government is not required to allocate installment payments made, first to the tax legally due, penalty, and interest

thereon, in that order, making subsequent payments refundable overpayments (R. 50), and finding instead that the Government had the right to apply the payments in any manner it saw fit (R. 71).

ARGUMENT

I

The Court should have applied the Government's own ruling applicable to partial payments of assessments by Taxpayers, as paid herein:

“Where an assessment is made for one or more years and there are not specific instructions as to the application of the partial payment tendered by the taxpayer, the amount of the payment will be applied by the District Director first to tax, penalty and interest, in that order, for the earliest year, then to tax, penalty and interest, in that order, for the next succeeding year, until the payment is absorbed. . . .”

Rev. Rul. 58-239, 1958-1 Cum. Bull. 94.

Although the foregoing Revenue Ruling deals with income taxes, the position of the Government and the Taxpayer is that the policy enunciated therein is likewise applicable to the payment of excise tax (R. 45).

Applying the above ruling, the tax owed, with penalty and interest was paid prior to April 23, 1963, and subsequent payments were overpayments.

II

The Court should have allowed Appellant Judgment for all overpayments made within two years of the date of filing Appellant's Claim for Refund.

The taxpayer is entitled to recover overpayments paid within two years immediately preceding the filing of a claim for refund.

26 U.S.C., Section 6511 (b) (2) (B) IRC 1954

The date of the overpayment is the date when total installments paid exceeds total tax liability.

Babcock & Wilcox Co. v. Pedrick, C.A.N.Y. 1954,
212 F.2d 645, 648 certiorari denied 75 S.Ct.
355, 348 U.S. 936, 99 L.Ed. 733

The overpayment is determined by comparison between amount due and amount actually paid.

Pine Hill Crystal Water Co. v. U.S. D.C. N.Y.
1954, 121 F. Supp. 480, 484

Havemeyer v. U. S., 1945, 59 F. Supp. 537, 551,
103 Ct. Cl. 564, certiorari denied 66 S.Ct.
139, 326 U.S. 759, 90 L. Ed. 456

Although no tax was owed, payment under threat of distraint resulted in "overpayment" by taxpayers and taxpayers were entitled to recover such "overpayment."

La Follette v. U.S.D.C. Cal., 1959, 176 F. Supp.
192, 195

Fischer & Porter Co. v. Porter, 1950, 72 A. 2d
98, 101, 364 Pa. 495

“In the case of a tax payable in installments, if the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the overpayment shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the overpayment shall be credited or refunded as provided in section 6402.”

26 U.S.C., Section 6403 IRC 1954

“In absence of some contrary indication, we must assume that the framers of these statutory provisions intended to convey the ordinary meaning which is attached to the language they used. See *Rosenman v. U. S.*, 323 U.S., 658, 661, 89 L.ed. 535, 539, 65 S.Ct. 536. Hence we read the word ‘overpayment’ in its usual sense, as meaning any payment in excess of that which is properly due. Such an excess payment may be traced to an error in mathematics or in judgment or in interpretation of facts or law. And the error may be committed by the taxpayer or by the revenue agents. Whatever the reason, the payment of more than is rightfully due is what characterizes an overpayment.”

Then referring to its legislative history, Sec. 281 of the 1924 Revenue Act, the Supreme Court stated additionally,

“The word was there used as a substitute for the previous reference to payments ‘in excess of that properly due,’ a phrase that is a perfect definition of an overpayment and that is not

necessarily confined to overpayments occasioned by errors made by taxpayers.”

Jones v. Liberty Glass Co., Okl. 1947, 68 S.Ct. 229, 332 U.S. 524, 92 L.Ed. 142, 148, rehearing denied 68 S.Ct. 657, 333 U.S. 850, 92 L.Ed. 1132, motion denied 68 S.Ct. 909, 334 U.S. 536, 92 L.Ed. 1157.

If we assume that the deficiency assessment and collection were without legal authority, the taxpayer's payment of that illegal assessment was an overpayment.

Kavanagh v. Noble, 68 S.Ct. 235, 237; 332 U.S. 535, 92 L.Ed. 150, 152.

CONCLUSION

For the foregoing reasons the Court should have granted Judgment for the Plaintiff for overpayments made within the two year limitation period, in the sum of \$12,000.00, plus interest thereon as allowed by law.

Respectfully submitted,

RAINBOLT & HAY

By.....

W. S. Rainbolt
Attorneys for Appellant

May, 1968

APPENDIX

APPENDIX A

TABLE OF EXHIBITS

- *Government's
Exhibit "A" Received per Stipulation.
- *Government's
Exhibit "B" Received per Stipulation.
- *Government's
Exhibit "C" Received per Stipulation.
- *Erroneously identified in the Transcript Index as Plaintiff's Exhibits.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated:day of May, 1968.

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W. S. RAINBOLT
Attorney for Appellant

